

[Review] John Harrington(2017) Towards a rhetoric of medical law

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Kenneth Veitch

University of Sussex

Kenneth Veitch, University of Sussex, Sussex Law School, Freeman Building, Brighton, BN1 9QE, UK. Email: K.J.Veitch@sussex.ac.uk

John Harrington *Towards a Rhetoric of Medical Law* (Abingdon, Oxon: Routledge, 2017)

John Harrington's book *Towards a Rhetoric of Medical Law* is a landmark publication in the field of medical law. Approaching medical law as a rhetorical practice, the book advances a new way of thinking about the law and its development in this area that moves beyond what has become the standard way of conceptualising medical law in the academy – namely, one that is concerned with measuring the success and development of the law by the degree to which it is deemed to be ethically supportable. In contrast to this 'law and ethics' approach, Harrington's rhetorical reading of medical law focuses on the importance of the indeterminate nature of legal reasoning and the various contexts in relation to which medical law exists and operates. Amongst other things, this approach to the subject enriches and broadens our understanding of its historical trajectory and changing forms and characteristics by linking it, for example, to developments in political economy, changing forms of medical labour, and shifting understandings of medicine.

The book's first two chapters set up its theoretical framework. Approaching medical law as a rhetorical practice, says Harrington, demands 'studying the arguments of legislators, judges, advocates, legal scholars and interested others as strategic exercises aimed at persuading specific audiences of the truth of certain facts and the desirability of certain courses of conduct.'¹ Law's indeterminacy means that persuasion is endemic to legal practice and argumentation; judges, for instance, seek to produce arguments and rulings that are plausible for the particular era and location within which they are made. They do so, at least partially, by drawing on what Harrington calls 'more or less concrete and localized common sense and cultural forms.'² Importantly, however, judges do not simply refer to, and deploy, pre-existing objective notions such as 'the community' or settled forms of shared values when constructing their arguments; rather, judicial speech and legal reasoning are also in the business of actively constructing such notions and values. Consequently, they are agonistic sites where struggles over rival understandings of a society's nature and values are played out. For Harrington, then, rhetoric has a crucial political dimension that is useful in comprehending the types of struggle that characterise medical law.

As well as this stress on the indeterminate nature of law, Harrington highlights the importance to his argument of a contextual understanding of law. Law is embedded

¹ J Harrington *Towards a Rhetoric of Medical Law* (Abingdon, Oxon.: Routledge, 2017), p. 2.

² *Ibid.*, p. 4.

in its broader social and economic contexts and we need to investigate the nature of this if we are to comprehend medical law as rhetoric. This contextual component manifests itself in Harrington's materialist understanding of law. However, rather than adopting the classic Marxist base-superstructure framework, in which the shape of the law is determined by the economic base, he deploys Bob Jessop's idea of ecological dominance. This allows Harrington to stress the 'asymmetric influence' of the capitalist economy over other social systems while maintaining that those systems, including the law, remain operationally independent and can themselves influence the direction of economic development. The result is a methodological approach to the rhetoric of medical law that combines the insights to be derived from a focus on legal indeterminacy with an emphasis on the important role that the capitalist economy plays both historically and today. Two specific phases of capitalism – the Keynesian era that ended in the mid-1970s and the neoliberal phase that continues today – operate as a framework through which Harrington makes sense of the historical development of medical law. The materialist perspective also enables him to direct attention to questions and themes – such as clinical and legal labour – that while unfamiliar to the field of medical law, turn out, via Harrington's persuasive analysis, to be both original and insightful lenses through which to understand developments in medical law.

Chapter 2 – entitled 'Paradox' – continues to establish the book's theoretical framework by developing a theory of the dynamic of change in medical law. Building on some existing work in medical law and drawing on systems theory, Harrington

argues that rhetorical struggles drive change in medical law. Owing to its indeterminate nature, law generally, and not just medical law, is ridden with paradoxes that can never be fully resolved but can only be deparadoxified by, for example, 'being displaced to other decision makers (or 'black boxes') outside of the legal system...'.³ In other words, law must manage its contingent nature by offloading its decision-making to others, as Harrington suggests was the case in *Bolam v Friern Hospital Management Committee*,⁴ where judges deferred to medical opinion in order, effectively, to define the legal standard of medical negligence. This tactic, Harrington argues, will only be successful to the extent that the relevant displacement is plausible – something that falls to the judge to ensure. Hence, we return to the importance of localised common sense and prevailing cultural forms. Does deference to medical opinion, for example, resonate with the types of 'common-sense assumptions that are shared between speaker and audience'⁵ – such as the cultural emphasis placed on professional autonomy at the birth of the welfare state – and broader social and economic arrangements existing at particular historical points in time? Equally, critics of the existing law will contest such displacements (reparadoxify them) by challenging both their arbitrary nature and the rhetorical means that have been deployed to effect them. According to Harrington, this paradoxification-deparadoxification-reparadoxification process is

³ Ibid., p. 18.

⁴ [1957] 1 WLR 582

⁵ Above n 1, p. 12.

how change occurs within medical law. It means that ‘medical law argumentation is unavoidably political’ as it involves the ‘unceasing struggle to achieve plausibility’.⁶

Having set out the book’s theoretical framework, Harrington uses the concept of the topic to structure most of the remaining chapters. Topics, he notes, are ‘positions or common-sense assumptions shared between speaker and audience, from which an argument can begin.’⁷ Harrington’s argument is that this concept is useful for charting the development of medical law because axiomatic assumptions – such that patients obtain all their medical information from doctors – may become questionable owing, for example, to technological developments, meaning that the assumption no longer acts as a solid basis from which an argument about a doctor’s duty to disclose information to a patient before treatment can proceed. Harrington identifies a variety of topics – including ‘national space; time and the organization of treatment; the NHS as a utopian project; [and] the idea of medicine as an art and as progressive science’⁸ – that underpinned British medical law in the post-WWII era and charts both their decline and the implications of this for the discipline of medical law.

This thematic approach to medical law not only distinguishes it from the standard academic mode of engaging with the subject – which is usually to take a particular

⁶ Ibid., p. 18.

⁷ Ibid., p. 12.

⁸ Ibid., p. 13.

issue within the field, euthanasia say, and examine the legal and ethical issues surrounding it – thereby contributing a fresh methodological approach to the discipline; it also enables links to be drawn between medical law and a much broader range of factors and issues that one rarely, if ever, finds discussed in this field. Thus, rather than tackle a case concerning access to NHS health care for a failed asylum seeker suffering from HIV (*N v Secretary of State for the Home Department*⁹) from a human rights or ethical perspective (chapter 3), Harrington approaches it via the theme of space. What, he asks, can the case reveal about the plausibility of the topic of UK territory – the importance of national scale and the nation-state – that has traditionally played an important, though taken-for-granted, role in medical law cases? Is this topic losing its plausibility as a result of globalisation? How did the judges in the case navigate the topic of territory; what rhetorical strategies and devices did they deploy in order to do so? In a fascinating chapter on the transformation of the NHS as a result of the shift from Keynesianism to neoliberalism, Harrington uses the example of surrogacy, its regulation, and academic arguments in favour of greater patient autonomy to chart the rise and decline in the utopian idea of the NHS. Presented by its founders not only as a source of free health care accessible at the point of need, but as a utopian vision of a socialist society freed from private property and money, Harrington traces how the rhetoric of medical law has shifted as this utopian vision has been steadily eroded. Thus, if the recommendation of the Brazier Report to maintain the ban on commercial surrogacy was still plausible in the context of this utopian vision, Harrington persuasively argues that some medical law scholars have developed an

⁹ [2005] UKHL 31

anti-utopian critique in which the NHS is characterised as authoritarian and doctors are charged with paternalism and smothering patient autonomy. This is a rhetorical move of its own, Harrington argues, aiming to construct ‘an ideal audience of sovereign patient-consumers’¹⁰; it also produces a new process-utopia in which the free market reigns. This rhetorical move within the field of medical law, in which patients and doctors are designed to meet as equals, garners plausibility in the neoliberal era and forms a new common-sense against which the commercialisation of surrogacy no longer looks out of place.

Another virtue of Harrington’s book is that it prompts us to engage with what we mean by the term *medical law*. It does so by exploring what medicine – its historical practices and changing forms, for example – might reveal not only about the case law in this area, but about the common law generally. Like medicine, the practice of the common law can, at different periods, be read as approximating an art or a science (Chapters 6 and 7). As Harrington notes, there are therefore elective affinities between medicine and the common law, such that we can learn something of the latter’s nature by studying the former. Medical law in this sense takes us beyond the common sense understanding of the term that has grounded writing in this field for the past few decades.

Constraints of space preclude further discussion of Harrington’s many other stimulating arguments and analyses. What, then, can be said of the book as a whole?

¹⁰ Above n 1, p. 106.

It brings a dazzling array of theory from many different disciplines to the analysis of medical law. Cultural theory, classical rhetoric, political economy, social theory, epistemology, political history, as well as legal theory – Harrington draws on insights from all of these fields and more to present a highly original perspective on medical law. One consequence of this is that the book is a challenging read. This is perhaps enhanced by Harrington’s tendency in some chapters to shift back and forth between complex abstract theory and descriptions and discussions of case law and legislation, or to draw on several theories simultaneously in the analysis of a particular area of the law. But the rewards and insights to be gained from accepting the challenge far outweigh the occasionally disorienting nature of the narrative.

Harrington’s book will be of great interest to those both within and outside of the legal academy who work on rhetoric. At a sub-disciplinary level, his erudite book makes a significant contribution to medical law scholarship. For too long, writing in this field has been dominated by the ‘law and ethics’ approach that Harrington identifies in the book’s opening pages (it should be noted that Harrington himself has a novel take on the relationship between ethics and medical law in the book’s final chapter). Through its careful, highly original and insightful interpretation of a variety of case law, legislation and academic writing in this area, the book takes medical *law* seriously and contextualises the discipline by demonstrating its inextricable relationship to broader questions of history, society, economy, and culture. His theoretically-informed approach does not mean, however, that he sacrifices coverage of familiar material in medical law. The law on surrogacy, clinical

negligence, the permanent vegetative state and the end of life, abortion, disclosure of treatment information to patients, and much more – all act as important sources of analysis within the book. But it is the unfamiliar and revealing ways in which the law in those areas is interpreted that make this book a *tour de force*. Like the law he analyses, Harrington's book might be viewed as a work of rhetorical practice. He seeks to persuade his audience that there is another plausible way of thinking about and studying medical law that is not driven by a concern with ethical questions and the moral goodness or otherwise of the law – a new common sense that seeks to draw links between the shifting form of medical law and important, though often neglected, questions of, *inter alia*, political economy, the changing nature of medical labour, and the creeping privatisation of the NHS. Given the contemporary relevance of such pressing matters of health politics and the book's charting of the historical transformation of health care in Britain, Harrington's book deserves, and should be, read by multiple audiences – including health care professionals, legal practitioners, policy makers, as well as legal, medical, social science, and humanities academics. At the very least, one hopes that it would inspire current and future generations of medical law scholars to develop further the type and breadth of scholarship contained in Harrington's excellent book.